

GREGORY K. FORD)	
Claimant)	
VS.)	
)	
LANDOLL CORPORATION)	Docket No. 210,488
Respondent)	
AND)	
)	
NATIONAL UNION FIRE INSURANCE CO. N.Y.)	
Insurance Carrier)	

While the original award was pending before the Court of Appeals, respondent and its insurance carrier learned that claimant had started working for the City of Manhattan and that claimant, therefore, no longer had a 100 percent wage loss. On October 28, 1999, respondent and its insurance carrier filed an application with the Division of Workers Compensation to review and modify the Board's decision that claimant had a 100 percent wage loss and a 50 percent permanent partial general disability.

The subject of this appeal is the December 9, 1999 Order in which Judge Benedict determined that claimant was disqualified from receiving any further permanent partial disability benefits. The Order was entered after a December 8, 1999 hearing in which claimant testified that he began working for the City of Manhattan in March 1998. Judge Benedict entered the Order before the parties had completed taking evidence and before the expiration of the terminal dates that the Judge had set for the review and modification proceeding.

Claimant contends Judge Benedict erred. Claimant argues that (1) the Judge had no authority to issue the Order because the proceeding was on appeal before the Court of Appeals, (2) there was no final order to modify because the Court of Appeals had not issued its decision, (3) it was improper to issue the Order before the terminal dates had expired as that violated the provision of the Workers Compensation Act that requires the fact finder to hear all competent evidence before modifying a claim,¹ (4) Judge Benedict's actions violated the provision of the Act that requires the payment of benefits, while a case is pending before the Court of Appeals, for the 10-week period preceding the Appeals Board's decision and continuing through the date that the Court of Appeals issues its decision,² and (5) the Judge terminated benefits without considering claimant's argument that he was no longer working for the City of Manhattan and, therefore, no longer earning a comparable wage because of the back injury that he sustained while working for the respondent. Claimant requests the Appeals Board to declare the December 9, 1999 Order null and void.

Conversely, respondent and its insurance carrier contend the Order should be affirmed. They cite the *Ruddick*³ decision for the propositions that respondent and its insurance carrier were not required to obtain an order to terminate benefits as claimant had returned to work at a comparable wage. They also argue that *Brown*⁴ holds that review and modification proceedings may be filed and litigated while the original award is on appeal.

The issue before the Appeals Board on this review is whether the Judge erred or exceeded his authority by issuing the December 9, 1999 Order declaring that claimant was disqualified from receiving any additional permanent partial disability benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds:

The Appeals Board finds and concludes that the Administrative Law Judge had the authority to entertain a review and modification proceeding despite the fact that the original award was pending before the Court of Appeals.

¹ K.S.A. 44-528(a).

² K.S.A. 1995 Supp. 44-556(b).

³ *Ruddick v. Boeing Co.*, 263 Kan. 494, 949 P.2d 1132 (1997).

⁴ *Brown v. Goodyear Tire & Rubber Co.*, 211 Kan. 742, 508 P.2d 492 (1973).

When the basis for review and modification is changed circumstances, the issues before the Judge in a review and modification proceeding are different than the issues decided in the original award. The review and modification addresses the changed circumstances and determines the award for the period beginning with the effective date of the modification. On the other hand, the original award addresses the facts at the time of the regular hearing and determines the award for the period beginning with the date of accident.

The Appeals Board finds and concludes that the legislature intended for awards to be modified upon a change of circumstances despite the fact that an appeal might be pending. Further, the Supreme Court in *Brown* determined that a review and modification award was a new award, which was based upon an entirely new and different record from the record presented at the time of the original award. The Court reasoned:

In *Brewington v. Western Union* [citations omitted] we held that an award of compensation made pursuant to the provisions of K.S.A. 44-528, providing for a review and modification of a former award, constitutes a new award. It is in no sense a review of the former award. In *Brewington* we pointed out that the purpose of 44-528 is to provide a means of increasing, decreasing or canceling compensation in accordance with the changed condition of the workman as justice requires. The compensation act provides its own complete and exclusive procedure. It makes no provision for the enforcement of a former award after it has been modified by the director in conformity with the statutory procedure for review and modification. In *Brewington* we also stated that the mere fact that an appeal had been perfected from the new award, which appeal was then pending in the district court, did not operate to reinstate the former award. The appeal from the new award presents to the district court an entirely new and different record from the record presented at the time the original award was made. . . .⁵

In *Brown*, the Supreme Court did not question whether an award that was pending before it could be modified. Instead, the Court determined that the review and modification award rendered moot the issues that had been presented by the original award and, therefore, dismissed the appeal.

On February 14, 2000, Judge Benedict entered the Award in the Review and Modification proceeding. In that Award, the Judge found that claimant started working for the City of Manhattan on March 16, 1998, and that the effective date for modifying the award was April 28, 1999. Additionally, the Judge found that as of April 28, 1999, claimant was earning at least 90 percent of his pre-injury average weekly wage and, therefore, claimant no longer had any work disability as of that date.

Based upon those findings and conclusions, the permanent partial general disability decreased from the 50 percent work disability to claimant's nine percent whole body functional impairment rating. Because the award for a nine percent permanent partial general disability had

⁵ *Brown*, p. 744.

been exhausted as of the effective date of the modification (April 28, 1999), claimant was not entitled to receive any more weeks of those benefits.

The claimant appealed the Review and Modification Award to the Appeals Board, which heard oral argument in that appeal on the same date as oral argument in this appeal. On today's date, the Appeals Board has affirmed the February 14, 2000 Review and Modification Award. Pursuant to *Ruddick*, a respondent and its insurance carrier may cease making permanent partial general disability payments when (1) a worker begins earning at least 90 percent or more of the average weekly wage that the worker was earning at the time of the injury and (2) the ultimate award to which the worker is entitled has already been exhausted.

The February 14, 2000 Review and Modification Award, which terminated the permanent partial general disability benefits effective April 28, 1999, renders moot the December 9, 1999 Order in which the Judge declared claimant disqualified from receiving those benefits. Because claimant is not entitled to receive any permanent partial general disability benefits for the period following April 28, 1999, the Judge's Order disqualifying claimant from receiving those benefits after December 9, 1999, no longer has any legal effect.

Therefore, this appeal should be dismissed.

WHEREFORE, the Appeals Board dismisses this appeal.

IT IS SO ORDERED.

Dated this ____ day of August 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Topeka, KS
Frederick J. Greenbaum, Kansas City, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director